TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 136

RICHARD ROE, CASUAL EJECTOR, AND GEORGE P. BURNETT, TENANT IN POSSESSION, PLAINTIFFS IN ERROR,

vs.

JOHN DOE EX DEM. JOHN M. M. CALDWELL.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF GEORGIA.

FILED DECEMBER 10, 1868.

SUPREME COURT OF THE UNITED STATES.

No. 345.

RICHARD ROE, CASUAL EJECTOR, AND GEORGE P. BURNETT, TENANT IN POSSESSION, PLAINTIFFS IN ERROR,

vs.

JOHN DOE EX DEM. JOHN M. M. CALDWELL.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF GEORGIA.

INDEX.

	Original.	Print.
Bill of exceptions	1-35	1-14
Certificate of judge to bill of exceptions	36	15
Writ of error	37	15
Citation	39	16
Copy of bond and certificate	40-41	17
Copy of declaration, process, plea, verdict, service and judgment	42-46	18-20
Certificate of clerk	47	21

1 Be it remembered, that at the March term, A. D. 1868, of the District Court of the United States for the northern district of Georgia, the Hon. John Erskine, judge of said court, then and there presiding, the cause of John Doe ex. dem. John M. M. Caldwell against Rich'd Roe, cas. ej. and George P. Burnett, tenant in possession, then and there pending upon the issue docket of said court, being an action of ejectment for the recovery of "The Rome Female College" property, lying and being in the city of Rome, county of Floyd, and State of Georgia, and in the northern district of Georgia, came on to be heard on the 30th day of March, A. D. 1868. The parties, plaintiff and defendant, having announced ready, the plaintiff's counsel read their declaration to the jury and offered in evidence the following deeds, which were submitted and read to the jury without objection, to wit:

A deed from Job Rogers to Nathan Bass, made and executed on the 10th day of December, 1850; a deed from Nathan Boss to Simpson Fouche, made and executed on the 2nd day of February, 1856; a deed from Simpson Fouche to A. M. Sloan, made and executed on the 2nd day of December, 1856; and a deed from A. M. Sloan to the trustees of the Rome Female College, made and executed on the 18th day of September, 1860; of which said deeds the following are true copies:

2 GEORGIA, *Floyd County*:

This indenture, made this the tenth day of December, in the year of our Lord one thousand eight hundred and fifty, between Job Rogers, of the State and county aforesaid, of the one part, and Nathan Bass, of the same place, of the other part, witnesseth: That the said Job, for and in consideration of the sum of twenty-five hundred dollars to him in hand paid at and before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, hath bargained, sold and conveyed, and doth by these presents bargain, sell and convey, unto the said Nathan, his heirs, assigns, administrators and executors, two certain lots or parcels of land, situate in the city of Rome, and known in the plan of said city as lots numbers seventy-eight and seventy-nine in the Costanaula division of said city and on which the said Rogers recently resided, to commence at the corner of the lot on which John H. Lumpkin resides, on Lincoln street; thence along the line which separates the lot of said Lumpkin from the above-described numbers, until it strikes the small street not yet named; thence along said street until it strikes the original land-lot line between Nos. two hundred and forty-five and two hundred and thirty-six, in the twenty-third district of the third section of originally Cherokee, now Floyd county; thence west
3 along said line until it strikes King street, or the new street leading to Verdery's bridge; thence south along said street to the graveyard; thence setting off east and running around the graveyard, as at present laid off, until it again strikes King street; thence along said street until strikes a thirty foot street called the old boundary; thence northeast along said street until it strikes Lincoln

street; thence south along said street to the beginning corner; to have and to hold said bargained premises unto him, the said Nathan, his heirs, assigns, administrators and executors, unto them and their own proper use, benefit and behoof, forever.

And the said Job, for himself, his heirs, assigns, administrators and executors, doth hereby warrant and forever defend the right and title of said bargained premises unto him, the said Nathan, his heirs, assigns, administrators and executors, against the claim or claim of himself and all other persons whatever.

In witness whereof the said Job hath hereunto affixed his hand and seal this the year and date above written.

[SEAL.] JOBE ROGERS.

Signed, sealed and delivered in presonce of—
W. C. HENDRICKS.
F. J. SULLIVAN, *J. P.*

GEORGIA, *Floyd County*:

CLERK'S OFFICE, SUP'R COURT.

Recorded in book H of deeds, at page 329, No. 384, this 30th day of October, A. D. 1852.

A. B. ROSS, *Clerk.*

4 GEORGIA, *Floyd County:*

This indenture, made this second day of February, eighteen hundred and fifty-six, between Nathan Bass, of the county of Bibb and State aforesaid, of the one part, and Simpson Fouche, of the county and State aforesaid, of the other part, witnesseth: That the said Nathan Boss, for and in consideration of the sum of twenty-five hundred dollars, to him in hand paid at and before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, hath bargained, sold and conveyed, and doth by these presents grant, bargain, sell and convey, unto the said Simpson Fouche, his heirs, executors, administrators and assigns, two certain lots or parcels of land, situate in the city of Rome, and known in the plan of said city as lots numbers seventy-eight (78) and seventy-nine (79) in the Costanaula division of said city, and on which the said Fouche now resides, to commence at the corner of the lot on which John H. Lumpkin resides on Lincoln street; thence along the line which separates the lot of said Lumpkin from the above-described numbers until it strikes the small street not yet named; thence along said street until it strikes the original land-lot line between Nos. two hundred and forty-five and two hundred and thirty-six, in the twenty-third district of the third section of originally Cherokee, now Floyd county;
thence west along said line until it strikes King street, or the
5 new street leading to Verdery's bridge; thence south along said street to the graveyard; thence setting off east and running round the graveyard, as at present laid off, until it again strikes

King street; thence along said street until it strikes a thirty foot street, called the old boundary; thence northeast along said street until it strikes Lincoln street; thence south along said street to the beginning corner; to have and to hold said bargained premises unto him, the said Simpson Fouche, his heirs and assigns, administrators and executors, unto them and their own proper use, benefit and behoof, forever.

And the said Nathan Bass, for himself, his heirs, executors, administrators and assigns, doth hereby warrant and forever defend the right and title of said bargained premises unto him, the said Simpson Fouche, his heirs, executors, administrators and assigns, against the claim or claims of himself and all other persons whatever.

In witness whereof the said Nathan Bass hath hereunto set his hand and affixed his seal the day and year above written.

[SEAL.] N. BASS.

Signed, sealed and delivered in presence of—
AUR. B. ROSS, JR.
DANIEL S. PRINTUP, *Not. Pub.*

GEORGIA, *Floyd County*:

CL'K'S OFFICE, SUP'R COURT.

Recorded in book "K" of deeds, at page 366, No. 319, this 27th Jan., 1857.

A. B. ROSS, *Cl'k.*

6 GEORGIA, *Floyd County*:

This indenture, made this 2d day of December, in the year 1856, between Simpson Fouche, of the county and State aforesaid, of the first part, and A. M. Sloan, of the same place, of the second part, witnesseth, that the said Fouche, for and in consideration of the sum of six thousand dollars to him in hand paid by the said Sloan at or before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, hath granted, bargained and sold to the said Sloan, and by these presents he doth grant, bargain, sell and convey unto him the said Sloan, his heirs and assigns, a certain lot of ground and the buildings thereon in the city of Rome, known as the Cherokee Female Institute, and bounded as follows, to wit: Commencing at the corner of the lot on which John H. Lumpkin resides, adjoining a small brick building used as an office on Lincoln street, and running thence along the line of said street in a northwesterly two hundred and eight feet to a stake; thence turning at about a right angle, and running in a direction a little north of east to a post about 6 feet from the northeast corner of a smoke-house on said lot; thence making an offset of 8 feet towards the northwest to a post in the line of palings, running, as before, in a direction a little north of east along said line of palings to a back street which separates said lot from lots now owned by Jobe Rogers; thence along the

line of said street two hundred and ten feet to the northeast
7 corner of John H. Lumpkin's lot; thence in a straight line along the plank fence which separates said lot from John H. Lumpkin's lot to the beginning corner; to have and to hold to him, the said Sloan, his heirs and assigns forever, in fee simple, the said lot and buildings thereon, together with all the benches and desks and blackboards provided by the said Fouche for the use of pupils; and the Fouche for himself, his heirs and assigns unto him the said Sloan, his heirs and assigns, the said bargained premises will warrant and defend against all claims whatsoever.

In testimony whereof the said Fouche hath hereto set his hand and seal the day and year above written.

[L. S.] SIMPSON FOUCHE.

Signed, sealed and delivered in presence of—
J. D. CAMERON.
GEO. S. BLACK, *J. S. C.*

GEORGIA, *Floyd County*:

CLERK'S OFFICE, SUPERIOR COURT.

Recorded in book "L" of deeds, at pages 210 and 211.
This 10th of April, 1858.

A. B. ROSS, *Cl'k.*

8 STATE OF GEORGIA, *Floyd County*:

This indenture, made this 18th day of September, in the year of our Lord one thousand eight hundred and sixty, between Andrew M. Sloan of the one part, and W. S. Cothran, Afred Shorter, N. J. Omberg, R. J. Johnson, H. V. M. Miller, John Jones, A. G. Pitner and their associates and successors as trustees of Rome Female College of the other part, witnesseth: That the said Andrew M. Sloan, for and in consideration of the sum of six thousand dollars, in hand paid, at and before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, hath granted, bargained, sold and conveyed, and by these presents doth grant, bargain, sell and convey unto the said parties of the second part, their associates and successors, or assigns and assigns, all that tract or parcil of land situated, lying and being in the city of Rome, known as the Rome Female College property, bounded as follows, to wit: commencing at a corner of John H. Lumpkin's lot, at his brick office on Lincoln street, and running thence along the line of said street in a northwesterly direction 208 feet to a stake; thence turning at a about a right angle, and running in a direction a little north of east to
9 a post about 6 feet from the N.E. corner of a smoke-house on said lot; thence making an offset of 8 feet towards the N.W. to a post in the line of palings running as before in a direction a little north of east along said line to a back street which separates said lot from lots known as Job Roger's lots; thence along the line of said

street 210 feet to the N.E. corner of J. H. Lumpkin's lot; thence in a straight line along the plank fence which separates said lot from John H. Lumpkin's lot to the beginning corner, to have and to hold the said bagained premises, with all and singular, the rights, members and appurtenances thereof to the said premises, being, belonging or in any wise appertaining to the only proper use, benefit and behoof of them, the said trustees, their associates, successors and assigns in fee-simple; and the said Andrew M. Sloan, his heirs, executors and administrators, the said bargained premises unto the said trustees of said college, their associates and successors and assigns against the said Andrew M. Sloan, his heirs, executors and administrators, and all and every other person or persons, shall and will warrant and forever defend by virtue of these presents.

In witness whereof the said Andrew M. Sloan hath hereunto set his hand and affixed his seal the day and the year first above-written.

[L. S.] ANDREW M. SLOAN.

Signed, sealed and delivered in the presence of—
G. G. MARLIN.
CHAS. H. SMITH, *J. S. C.*

GEORGIA, *Floyd County*:

CLERK'S OFFICE, SUPERIOR COURT.

Recorded in book M of deeds, at page 346, No. 393, this 1st day of October, 1860.

A. B. ROSS, *Clk.*

10 The plaintiff then offered in evidence a deed from the trustees of the Rome Female College, signed by W. S. Cothran, Alfred Shorter, Albert G. Pitner, R. J. Johnston, Chas. H. Smith, H. V. M. Miller, N. J. Omberg, and Robert C. Word, to J. M. M. Caldwell, the plaintiff in the cause, made and executed on the 18th day of September, A. D. 1860, to the admission of which, either as conveying title, or for the purpose of showing color of title in the plaintiff, the defendant then and there by his counsel objected, which objections were then and there overruled by the court, and the deed admitted in evidence and read to the jury. To which decision the defendant then and there acccepted and now assigns the same for error, and of which said last-mentioned deed the following is a true copy:

11 GEORGIA, *Floyd County:*

This indenture and covenant made the 18th day of Sept., 1860, between "the trustees of Rome Female College" of the one part, and Rev. John M. M. Caldwell of the other part, witnesseth:

That the said board of trustees, for and in consideration of the sum of four thousand sixty-four 46-100 dollars cash in hand paid and for other considerations hereinafter mentioned, have granted, bargained

and sold, and by these presents do grant, bargain, sell and convey unto the said J. M. M. Caldwell, his heirs and assigns, subject to the conditions and limitations hereinfter contained, all that real estate situate in the city of Rome known as the Rome Female College property, described and bounded as mentioned in a deed from A. M. Sloan to the trustees of Rome Female College, to have and to hold the same with all of its rights and appurtenances; and the parties do hereby covenant and contract with each other in relation to said property as follows, making mention first of the—

Inducement.

The board of trustees are induced to make sale of the college property in order to raise the means to pay the balance of the purchase-money due for the college property, amounting to four thousand and sixty-four 46-100 dollars, which debt is now pressing and of long standing, and the board see no other way of raising the means to cancel said debt.

12 The said board of trustees, desiring, if possible, to make such a sale as will vest the property in private hands, and at the same time tend to perpetuate it for the uses and purposes designed, do hereby retain to themselves and their successors the same rights and privileges which they now have as to the election or appointment of teachers, course of study, rates of tuition, and everything else appertaining to the government and purposes of the institution, so long as it remains under charge of the synod of Georgia, saving such rights as are hereinafter yielded or limited; but shall have no control over the grounds or buildings as property.

It is hereby agreed and solemnly covenanted between the parties that the said property shall be hereafter used for the purposes originally designed and intended by those whose charities have founded the said college; that no sale shall hereafter be made of it that will manifestly prevent or destroy that use, except for unavoidable and imperative necessity. This board, however, do hereby acknowledge the right of the said Caldwell to make such sale upon various contingencies that may possibly arise, as for example upon the death of himself or wife, or the destruction of the property by fire, or such decline in the patronage of the institution as would not justify it being continued, or such serious disaster to said Caldwell or his family, either in health or fortune, as compels him to sell. But any such contingency or any other of like necessity must be acted on only in good faith, and not then without giving the board of trustees

13 an opportunity to repurchase the property at its cost and the cost of all improvements hereafter made; meaning the present purchase-money and the cost of improvements added.

Inasmuch as he said J. M. M. Caldwell would not hazard the purchase of said property if he were not to be the beneficiary of the same, and that he may not hold his position as president of said college by an insecure or uncertain tenure, the board hereby covenant that the said J. M. M. Caldwell be now declared and appointed as

president of said institution, and his wife, Mrs. C. E. Caldwell, as principal teacher, so long as they remain in possession of said property, subject only to removal by a vote of three-fourths of the whole board and ratified by the synod of Georgia on memorial made and proof of the causes stated; and should the said Caldwell retire voluntarily from said office, he shall have the right to rent said property for the uses aforesaid to such person or persons as the board may approve, or to sell the same, subject to the condition of the covenant.

It is further covenanted that in case of such resignation or removal the vacancy shall be filled by the board, but the president shall have power to make his own appointments of subordinate teachers subject only to be vetoed by a majority vote of the whole board or unanimous vote of any legal quorum, after said teacher has filled his position for the space of one session.

14 It is further covenanted that whenever any disposition shall be made of said property which hinders or prevents its use for the purposes aforesaid, the board retain their organization and the chartered name of the institution, and the right to act under the same at any other locality in the city of Rome, or near thereunto.

And the said parties of the first part do hereby warrant the title to the said property "as trustees only," to the said J. M. M. Caldwell, his heirs and assigns, subject to the foregoing limitations, forever in fee simple, "without incurring any personal liability whatever."

In witness whereof they have hereto set their hands and seals this the above day and date.

[L. S.]	W. S. COTHRAN, *Trustee.*
[L. S.]	ALFRED SHORTER, *Trustee.*
[L. S.]	ALBERT T. PITNER, *Trustee.*
[L. S.]	R. J. JOHNSON, *Trustee.*
[L. S.]	CHAS. H. SMITH, *Trustee.*
[L. S.]	H. V. M. MILLER, *Trustee.*
[L. S.]	N. J. OMBERG, *Trustee.*
[L. S.]	ROBERT C. WORD, *Trustee.*

"As trustees only" and "without incurring any personal liability whatever," interlined before signed. In presence of—

C. O. STILLWELL,
D. M. M. CARY, J. P.

GEORGIA, *Floyd County*:

CLERK'S OFFICE, SUPERIOR COURT.

Recorded in book M of deeds, at page 347 and 8, No. 394, this 1st day of October, 1860.

A. B. ROSS, *Cl'k.*

15 The plaintiff then introduced H. V. M. Miller, who, after being duly sworn, testified as follows, to wit: I am well acquainted with "The Rome Female College" property. I resided in Rome and have known the property since the year 1837. Job

Rogers was in possession of the property during that year, resided on it. and continued in possession up to about the year 1850, when Nathan Bass went into possession and continued in possession three or four years. He lived on the place most of this time, and occupied the place as his property. His possession was followed by that of Simpson Fouche, who lived on the place, and continued in possession three or four years. After Fouche went out of possession, the plaintiff, Jno. M. M. Caldwell, went into possession and continued in possession until, I think, some time in the year 1863. Caldwell must have been the tenant of the trustees.

Jobe Rogers still occupied the property in 1849. He was absent repeatedly. Rogers himself was absent from the town a part of the time. He was absent at one time as much as a year. I knew
16 the reason of his removal and return. I do not know of my own knowledge that he had a tenant on the place. I know it from general reputation. I cannot say that Rogers put the tenant there at all. He left there, I think, in 1838, and returned in 1839. I think he remained until he sold to Col. Bass; that was after 1849. Bass or his tenants were in the house; cannot state that Bass stayed there continuously, or that he was there all the time. He may have been absent for days, weeks or months. Cannot say that he or his family were there all the time. Cannot say of my own knowledge that he occupied the property continuously for three years. I know that these men were in possession of the property, so far as I knew. I mean by occupation that he, Bass, occupied the house when he pleased and went away when he pleased. He was absent as much as a month, it may have been longer; cannot say how long. He did not report to me on his return nor ask my leave when going away. Fouche was there as much as three or four years. Caldwell followed Fouche; cannot state the day. He went in immediately
17 after Fouche; it may have been two or three days or it may have been the very day Fouche left. My opinion is Fouche did not put him in possession. I know he went in as an ordinary tenant of a house. Do not know that he went in as the tenant of any one. Can state under whom Caldwell went into possession. He remained there until 1863 Burnett occupied the house the last time I was in Rome. There were twenty trustees to the college to the best of my recollection. I cannot state how they were elected. The question of a quorum frequently came up at the meetings of the trustees. It was stated that seven of the trustees constituted a quorum. The reason assigned for it was that it was difficult to get a majority together. I was told so by the trustees in their meetings. I do not know whether they had a by-law on this subject.

18 John M. M. Caldwell, lessor of the plaintiff, was then sworn and testified as follows:

I have known the premises in dispute since March, 1845. Job Rogers was then in posession; he remained there until Bass came in; cannot state what year this was; it must have been from 1850 to 1852. Rogers had possession continuously until a short time before Bass came in. Underwood and Spullock were there a short time

under Rogers; they made a trade for the place, which was cancelled, and the posession was returned to Rogers. Bass came there as an experiment, to see if the place would suit his family. He stayed there some time; frequently went away to stay a few weeks, but left his servants and furniture in the house. Fouche came after Bass; he occupied the place two or three years; his posession was continuous; witness went into posession next; he, witness, went in under Sloan.

19 Witness was elected president and agent of the college and remained there until the deed was made to the trustees, and then went in under the trustees. My wife had been teaching there for years and had quite a reputation; I did not occupy under any one but Sloan and the trustees until I bought the property; afterwards I occupied it in my own right.

(At this stage of the examination of the witness plaintiff's counsel proposed to prove by the witness that the land described in some of the deeds in evidence by metes and bounds was the same land or a part of the same land as that described, in the other deeds in evidence, by numbers, and in order to refresh the memory of the witness, proposed to submit all the deeds in evidence to the witness for his examination and comparison, and that he then should testify in reference to the matter. To this the defendant objected, which objection was then and there overruled, and all the deeds submitted to the witness for his comparison and examination, to which decision defendant's counsel then and there excepted, and now assigns the same for error.)

20 Witness then testified that the lands described in the deeds in evidence by metes and bounds was the same land as that described in the other deeds by numbers, and that the lands described by metes and bounds is the same as that described as city lots numbers 78 and 79, seventy-eight and seventy-nine. The property sold by Rogers to Bass included several acres besides 78 and 79. Underwood contracted for all except numbers 78 and 79, and Spulloch contracted for numbers 78 and 79. I cannot say how many trustees were acting when the deeds were made. There were frequent deaths and removals. When the deeds were made I remember that only the following persons were trustees in addition to those whose names are signed to the deeds, to wit, Crawford, J. O. Scott, Telford, Lockrige and Sloan. Witness was also a trustee. A quorum consisted of seven trustees when the college was first founded. The number necessary to constitute quorum was afterwards reduced to five, which last number was authorized to transact ordinary business. At the meeting of the board, when the deed was made, there were ten trustees present, those who signed the deed and A. M. Sloan and myself. I paid the full amount of the

21 purchase money to the trustees. I removed my family to Rome in 1845; I first went to Rome the latter part of 1844 or the beginning of 1845. I first resided or boarded with McIntu, on Main street; I lived in sight of the property a number of years and in the female academy three or four years, which was near the Methodist church. Job Rogers was living on and occupying the college prop-

erty in the latter of 1845; from my own knowledge he occupied 78 and 79 and the Fouche property; the house was on 78 and 79, constituted the back lot and garden. The city council of Rome opened a street in the Costanaula division of the city, one street and one only. I know nothing of lots being laid off by the city council; I never saw a corner mark or stake on either of these lots; I know the lots were numbers 78 and 79 from knowing the locality of the house and by examining a map of the city of Rome, provided by the city council, with these numbers on it; have seen the map in the posession of the officers of the city. All the deeds that we have show that the line com-
22 mences at the corner of Judge Lumpkins' office. I know the numbers from the deeds map, and from Job Rogers, and from general rumor. I understood Mr. Rogers sold the land to Spulloch & Underwood. From the time I went there in 1845 Rogers remained there a number of years. Spulloch lived in the Rogers houses a while, a year or two before Bass purchased it. I do not know of my own knowledge how Spulloch went into possession; do not know of my own knowledge that Bass ever purchased the place. Bass was in posession and occupied the houses; was at the house a part of the time and was away a part of the time. Bass remained there, going backwards and forwards; stayed there awhile; removed his family away, and Spulloch was in posession. Spulloch was in posession after Bass and before Fouche. Fouche occupied the property three or four years. When Fouche went out I went in. I held the property three or four years under Sloan. I had no contract with Sloan as an individual. Sloan made his arrangements with
23 the trustees, I suppose. I went into the property; was elected president of the college. Sloan owned the property, and I was not present when Sloan made the arrangement referred to with the trustees. I went in as president; don't remember any contract between Sloan and the trustees. I remained there as president until I bought the property, up to the date of my deed. There were eighteen trustees to the institution; do not know how it occurred. The trustees were appointed by the synod of Georgia. The synod kept minutes. I was present when the board was appointed, and aided in getting up the board, but did not read the minutes. My impression is that seven was made a quorum by the synod. The synod filled all vacancies. The following-named persons were appointed trustees by synod: W. S. Cothran, Alfred Shorter, A. G. Pitner, R. J. Johnson, C. H. Smith, H. V. M. Miller, N. J. Omberg, Robt. C. Word, James Sprouls, A. Y. Lockridge, Crawford Telfourd, J. N. Scott, J. M. M. Caldwell, J. F. Lanneau. I cannot say who had resigned or who had been put in their place. The map I saw was the one
24 used by the city marshall. I saw the numbers of the lots on the map, and the lots appeared in their place on the same. I did not set up adverse title while I was president. I recognized Sloan as owner or landlord until I purchased the property. Vliet did not pay the balance of the purchase money. I held the property under the trustees for about one day. The trustees requested me to occupy the house. I never made any contract with Sloan about

the property. I never paid Sloan any rent. There was a financial book kept by the trustees; that is, a book contain'g entrys of reciepts and disbursements. I do not know whether the trustees kept any record of their actions and proceedings, or other books. If any book was kept it was kept by Dr. Word, who was the secretary. I suppose he wrote down the proceedings of the trustees.

At this stage of the examination the plaintiff's counsel propounded the following question, to wit:

Who did Spulloch inform you he held under?

To which question, and to any answers being made to the same, the defendant's counsel then and there objected, which objection was overruled, and the question propounded, and answered by the
25 witness, as follows:

Spullock said to me he did not claim the property, but that it was Bass' property.

To which question and answer the defendants then and there excepted, and also to the ruling of the court allowing the same and admitting the answer, and now assigns the same for error.

Here the bond of the witness to Edgar Vliet was exhibited to him, when he testified:

The bond is my bond. I made and delivered it to Vliet, who paid me four thousand dollars in confederate money at the date thereof, and also made and delivered to me his notes for the balance of the purchase money at that time; the one to become due on the first day of April, 1864, and the other to become due on the first day of July, 1864, each for the sum of seven thousand dollars. I put Vliet in possession of the Rome Female College property under this bond at about the date of the bond; that at a meeting of the trustees, when ten trustees were present, it was resolved to sell the property to witness, and that trustees should sign the deed.

26 Defendant's counsel admitted in writing that the defendant was in posession of the premises sued for at the commencement of the suit; and also that the handwriting of the trustees to the deed made by them to Caldwell was genuine.

Here the plaintiff closed his case; when the George P. Burnett, the defendant, was duly sworn, and testified as follows:

I bought the property in dispute from Edgar Vliet, and said Vliet transferred the bond of J. M. M. Caldwell, now exhibited, to him, (the same having been heretofore exhibited to Caldwell,) to him, i.e., to George P. Burnett, as will appear by the entry thereon; and that said Vliet put him in posession of the premises under said bond; that he has continued in posession under this bond up to this date.

Here counsel for the defendant proposed to asked the witness the following questions, to wit:

What did you give for the property? How much have you paid, and how did you pay it? And did you or not pay for the property a valuable consideration?

To which questions, and to any answers being made thereto by the witness counsel for the plaintiff objected. The court sustained the objection and overruled the questions. To which ruling of the court the defendant's counsel then and there excepted, and now assigns the same for error.

The defendant's counsel then read the bond of said J. M. M. Caldwell, the lessor of the plaintiff, to Edgar Vliet, and the transfer thereon by said Vliet to the defendant, George P. Burnett, of which the following is a true copy, and closed his testimony:

28 GEORGIA, *Floyd County*:

Know all men by these presents, that I, J. M. M. Caldwell, of said State and county, do acknowledge myself held and bound in the sum of thirty-six thousand dollars to Edgar Vliet, late of New Orleans, and to his heirs and assigns, for the true payment of which I bind myself, my heirs, and executors, and administrators, jointly and severally, firmly by these presents, sealed and dated this January, 26, 1864.

The condition of which bond is, that whereas said Edgard Vliet has, this day, paid me the sum of four thousand dollars in currency, and has made and delivered to me his two certain promissory notes of this date for seven thousand dollars each, one due the 1st day of April next, and the other due the 1st day of July next, with interest from date:

Now, if said Edgar Vliet shall pay, or cause to be paid, the said notes according to their tenor and effect, and I, the said Caldwell, shall then make, or cause to be made unto him good warrantee titles in fee simple to that property, in the city of Rome, known as Rome Female College property, as described in deed from A. M. Sloan to the trustees of said college; then the above bond to be null and void, else of full force and virtue.

In witness whereof I have this day set my hand and seal.

[SEAL.] J. M. M. CALDWELL.

Witnesses:
FOSTER ELY.
C. H. SMITH, *Not. Pub.*

SELMA, ALA., *Feb.* 16, '65.

For value received, I transfer the within bond to Geo. P. Burnett.
EDGAR VLIET.

30 After argument had, the court charged the jury as follows:

After referring to the alleged deeds from Rogers to Bass, 1850, from Bass to Fouche, 1856, Fouche to Sloan, 1860, Sloan to the trustees of the Rome Female College, 18th September, 1860, and

the trustees of the Female College to the lessor of the plaintiff Caldwell, and the bond for titles from Caldwell to Vleit, who put the terre tenant or defendant in possession, said that if the jury believed from the evidence produced on the trial that Rogers was in continuous, adverse and absolute possession of the premises in dispute for seven years prior to the making of the deed of conveyance to Bass, notwistanding he so held possession without written title, they will find for the plaintiff, otherwise for the defendant. Or, if they are satisfied from the evidence in the case that the lessor of the plaintiff and those under and through whom he claims held the said premises continuously, adversely and absolutely, under color of title, for seven years from the date of the delivery of the deed of conveyance from Rogers to Bass, they will find for the plaintiff. If, on the contrary, they do not believe that Caldwell so held the premises, they will find for the defendant.

31 It is a general principle that when a party acquires the possession of land, under an executory contract of purchase, for example, a bond for title, the vendor cannot maintain an action of ejectment against him until he has demanded possession or given him notice to quit.

The possession of the purchaser being lawful in its inception, does not become wrongful until he is called upon to restore it; but the right to retain the possession may be forfeited by the purchaser. If he repudiates the contract under which he obtained the possession, or fails to comply with its terms, the vendor is at liberty to treat the contract as rescinded, and regain the possession by an action of ejectment. In such case neither a demand of possession nor a notice to quit is necessary.

The moment the vendee or purchaser fails to perform the contract, his possession becomes tortious, and notice to quit is wholly unnecessary. This ejectment is not brought to enforce the contract of sale, but to regain possession of the land acquired under it.

To which charge, and especially to the following portion of said charge, to wit: "But the right to retain the possession may

32 be forfeited by the purchaser; if he repudiates the contract under which he obtained the possession, or fails to comply with its terms, the vendor is at liberty to treat the contract as rescinded, and regain the possession by an action of ejectment. In such case neither a demand of possession nor a notice to quit is necessary. The moment the vendee or purchaser fails to perform the contract his possession becomes tortious, and notice to quit is wholly unnecessary."

Defendant, by his counsel, then and there excepted, and now assigns the same for error.

After which charge the court enquired of counsel for plaintiff and defendant if they had any requests they desired given in charge to the jury, when counsel for defendant read the following paper, and requested that the same be given in charge to the jury, to wit:

1. That if the plaintiff relies on a possessory title, his possession and of those under whom he claims must be clearly and unequivocally proved.

2. That such possession must be regular, continuous and uninterrupted.

33 3. That if the plaintiff seeks to prove the possession of the parties under whom he claims, by showing other parties in possession, then he must show that those parties held under the person having the legal title, or having a deed at the time they were in possession; otherwise the continuity of the possession is broken.

4. If the jury believe that the plaintiff sold the premises in dispute to Edgar Vleit, and gave him his bond for title, obligating himself upon the performance of the conditions therein expressed to make a deed to him and his heirs and assigns, and that he received a part of the purchase money and then put said Vleit in possession of the premises under the bond, and that Vleit subsequently sold to the defendant, Burnett, and transferred and assigned the bond to him and put him in possession in like manner, then the possession of both Vleit and Burnett was lawful and neither were wrong-doers or trespassers, and that ejectment cannot be legally instituted or maintained without first giving notice to quit to either Vleit or Burnett, or demanding the possession of the premises from either one or the other of the said parties, or by the determination of the lawful possession of one or both of said parties in some other way. And it is

34 incumbent on the plaintiff to prove that such notice or demand, or other determination of such lawful possession was given or made before the institution of this suit.

Which charge or request the court declined to give, to which refusal of the court to give said requests, numbered respectively 1, 2, 3, 4, counsel for defendant then and there excepted, and now assigns the same for error.

Counsel for defendant then handed the court the following, and requested that the same be given in charge to the jury, to wit.

"A party claiming under possession, or a title bond upon possession alone, cannot recover in ejectment against one lawfully in possession at the time of the demise of the lessor of the plaintiff or the commencement of the suit."

After reading which the court declined to give the same in charge to the jury, to which refusal defendant by his counsel then and there excepted, and now assigns the same for error.

35 And as the facts aforesaid do not appear of record, the defendant aforesaid, the said George P. Burnett, presents this his bill of exceptions, within ten days from the date of the judgment rendered in said cause, and prays that it may be signed and certified by the presiding judge in said cause, and that it may become a part of the record in the same.

Dated this fourth day of April, A. D. 1868.

SMITH & BRANHAM,
WILLIAM DOUGHERTY,
Atto's for pl'ff in error.

36 I do certify that the foregoing bill of exceptions is true, and contains all the evidence material to a clear understanding of the errors complained of, and the clerk of the District Court of the

United States for the northern district of Georgia is hereby required and ordered to make out a complete copy of the record of said cause, and certify the same to be a true and complete copy, and cause the same to be transmitted to the next term of the Supreme Court, to be holden at the city of Washington on the first Monday in December next, that the errors alleged to have been committed may be considered and corrected. I further certify that proof has been submitted to me showing that the property recovered in the case exceeds in value the sum of two thousand dollars.

Atlanta, Ga., April 4, 1868.

JOHN ERSKINE,
Judge of the District Courts of the United States for the District of Georgia.

Filed in office 4th April, 1868.

W. B. SMITH, *Cl'k.*

37 UNITED STATES OF AMERICA, *ss*:

The President of the United States to the judge of the District Court of the United States for the northern district of Georgia, greeting:

Because, in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said District Court before you, between John Doe ex. dem. John M. M. Caldwell and Richard Roe, casual ejector, and George P. Burnett, tenant in possession, a manifest error has happened. to the great damage of the said George P. Burnett, as by his complaint appears, we being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the party aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the first Monday of December next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Salmon P. Chase, Chief Justice of the said Supreme Court, the ninth day of March, A. D. one thousand eight hundred and sixty-eight.

[SEAL.] W. B. SMITH, *Clerk.*

38 Filed a copy of the within writ of error in the clerk's office of the District Court of the United States for the northern district of Georgia, for Messrs. Brown & Pope, attorneys and counsellors for defendant in error, on this 11th April, A. D. 1868, the same being within ten days of the date of the judgment, Sundays exclusive, and notified them of the same April 11th, 1868.

A. B. CULBERSON.

Before me, W. B. Smith, clerk, comes A. B. Culberson, and being duly sworn, saith the above entry and facts stated therein are true.

Sworn to and subscribed before me this 11th April, 1868.
[SEAL.] A. B. CULBERSON.
W. B. SMITH, *Clerk.*

Endorsed: John Doe, ex. dem., Jno. M. M. Caldwell *vs.* Richard Roe, cas. ejector, and George P. Burnett, tenant in possession. Original writ of error, filed in office April 11th, 1868. W. B. Smith, clerk.

39 UNITED STATES OF AMERICA, *ss*:

To John M. M. Caldwell, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the District Court of the United States for the northern district of Georgia, wherein George P. Burnett is plaintiff and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable John Erskine, judge of the District Court of the United States for the northern district of Georgia, this, the fourth day of April, A. D. 1868.

JOHN ERSKINE,
Judge of the District Courts of the United States for the District of Georgia.

On this, the fourth day of April, A. D. 1868, personally appeared before me, the subscriber, A. B Culberson, and makes oath that he delivered a true copy of the within citation to Brown & Pope, attorneys and counsellors for defendant in error.

Sworn to and subscribed before me the day and year above written.

A. B. CULBERSON.
JOHN ERSKINE,
U. S. Dist. Judge.

Filed in office, 4th April, 1868.
[SEAL.] W. B. SMITH, *Clerk.*

40 Supreme Court of the United States.

Ejectment, &c.

JOHN DOE EX DEM. JOHN M. M. CALDWELL,
vs.
RICHARD ROE, CASUAL EJECTOR, AND George P. Burnett, tenant in possession.

Know all men by these presents that we, George P. Burnett, of the city of Rome, county of Floyd, and State of Georgia, Henry G. Cole, of Marietta, county of Cobb, and State of Georgia, and Joel Branham, sr., of Atlanta, county of Fulton, and State of Georgia, all of the northern district of Georgia, are held and firmly bound unto John M. M. Caldwell, in the sum of one thousand dollars, to be paid to the said John M. M. Caldwell, his executors or administrators, to which payment well and truly to be made we bind ourselves, and each of us, firmly and severally, and our and each of our heirs, executors and administrators firmly by these presents.

Sealed with our seals, and dated this, the second day of April, A. D. 1868.

Whereas the above-named George P. Burnett has prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled suit by the Dis-
41 trict Court of the United States for the northern district of Georgia:

Now, therefore, the condition of this obligation is such that if the above-named George P. Burnett shall prosecute his said writ of error to effect, and answer all damages and costs if he shall fail to make good his plea, then this obligation shall be void, otherwise the same shall be and remain in full force.

[SEAL.] GEO. P. BURNETT.
[SEAL.] H. G. COLE.
[SEAL.] JOEL BRANHAM.

Sealed and delivered in the presence of, approved and tested by me.

W. B. SMITH, *Clerk*.

In person appeared before me Henry G. Cole and Joel Branham, sr., who being duly sworn, say each for himself, that he is worth the sum of one thousand dollars over and above his just debts and liabilities.

Sworn to before me.

W. B. SMITH, *Clerk*.

Filed in office this 3d day of April, 1868.

[SEAL.] W. B. SMITH, *Clerk*.

The amount of the within bond is agreed upon by consent, April 3, 1868.

BROWN & POPE, *Atty's for Caldwell*.

In the District Court of the United States for the northern district of Georgia.

I certify that the foregoing is a true, correct and perfect copy of the original bond executed by the plaintiff in error, for the purpose of carrying his case to the Supreme Court of the United States, as said original bond remains of file in my office.

Given under my hand and seal of the court, this 4th day of April, 1868.

[SEAL.] W. B. SMITH, *Clerk.*

42 UNITED STATES OF AMERICA, *Northern District of Georgia:*

To the honorable judge of the District Court of the United States for the northern district of Georgia:

The petition of John Doe, who avers that he is a citizen of the State of North Carolina, in the United States of America, residing in said State of North Carolina, respectfully showeth that Richard Roe, who the said John Doe avers is a citizen of the State of Georgia, in the United States of America, residing in the northern district of said State of Georgia, has damaged the said John Doe twenty thousand dollars.

For that whereas, heretofore, to wit, on the eighteenth day of September, in the year of our Lord one thousand eight hundred and sixty, at Floyd county, to wit, in the northern district of Georgia, aforesaid, one John M. M. Caldwell, who petitioner avers is a citizen of the State of North Carolina, in the United States of America, residing in said State, had demised to said John Doe all that tract or parcel of land situate, lying and being in the city of Rome, to wit, in the northern district of Georgia aforesaid, known as the Rome Female College property, bounded as follows, to wit: commencing at a corner of a lot formerly owned by John H. Lumpkins, now deceased, at the brick office of said Lumpkins, on Lumpkins street, and running thence along the line of said street in a northwesterly direction the distance of two hundred and eight feet, to a stake corner; thence turning at about a right angle and running in a direction a little north of east to a post about six feet from the northeast
43 corner of a smoke-house on said lot; thence making an offset of eight feet towards the northwest to a post on the line of palings running as before, in a direction a little north of east, along said line to a back street, which separates said lot from lots known as the Job Rogers lots; thence along the line of said street to the distance of two hundred and ten feet to the northeast corner of the said lot, formerly owned by said John H. Lumpkins; thence in a straight line along the fence which separates said lot from the said John H. Lumpkin's lot, to the beginning corner, said tract of land containing three acres, more or less, together with the appurtenances to said tract of land belonging, to have and to hold the same unto the said John Doe, his heirs and assigns, thenceforth for the term of twenty years thence next ensuing, and fully to be completed

and ended, by virtue of which demise the said John Doe entered into the said tract of land, with the appurtenances, and became and was possessed thereof for the said term so to him thereof granted; and the said John Doe being so thereof possessed, the said Richard Roe afterwards, to wit, on the day and year aforesaid, with force and arms entered into the said tract of land, with the appurtenances, in which the said John Doe was so interested in manner and for the time aforesaid, which is not yet expired, and ejected the said John Doe from said tract of land, with the appurtenances thereof, and other wrongs to the said John Doe then and there did, to the great damage of the said John Doe, to wit, twenty thousand dollars, and against the peace of the State.

44 Wherefore petitioner brings his suit and prays process may issue requiring the said Richard Roe personally or by attorney to be and appear at the next term of said court, to be held in Atlanta on the second Monday in September next, to answer petitioner in an action of trespass and ejectment.

BROWN & POPE, *Pl'ff's Att'ys.*

Mr. George P. Burnett, Rome, Ga.:

DEAR SIR: I am informed that you are in possession of or claim title to the premises in the accompanying writ of trespass and ejectment mentioned, and I, being sued as casual ejector only, and having no title or claim to said premises or any part thereof, do advise you to appear at the next term of the United States District Court for the northern district of Georgia, to be held in Atlanta on the second Monday in September next, then and there by the rule of said court to cause yourself to be made a party defendant in my stead, or I will suffer judgment to be entered against me, and you will be turned out of possession.

Atlanta, Ga., August 8th, 1867.

Respt'lly, &c.,

RICHARD ROE.

In United States District Court for the northern district of Georgia.

Trespass and ejectment.

JOHN DOE EX DEM. JOHN M. M. CALDWELL *vs.* RICHARD ROE. } Trespass and ejectment.

UNITED STATES OF AMERICA, *Northern District of Georgia*:

The President of the United States to the marshall of the district of Georgia, greeting:

45 The defendant, Richard Roe, is hereby required to be and appear at the next term of said District Court, to be held at Atlanta on the second Monday in September next, then and there to answer the plaintiff in an action of trespass and ejectment, or in default thereof the court will proceed as to justice shall appertain.

Witness the Honorable John Erskine, judge of said district, this the eighth day of August, in the year of our Lord one thousand eight hundred and sixty-seven.

[SEAL.]

W. B. SMITH, *Clerk.*
BROWN & POPE,
Plaintiff's Attorneys.

Filed in office August 8, 1867, 1 o'clock p. m.
[SEAL.] W. B. SMITH, *Clerk.*

Served a copy of the within on Geo. P. Burnett by leaving at his residence in Rome, Ga.
August 19th, 1867.

C. H. ELGAN,
U. S. Deputy Marshall, N. D. of Ga.

In United States District Court for the northern district of Georgia.
September term, 1867.

JOHN DOE EX DEM. J. M. M. CALDWELL
vs.
ROE CO., EJECTOR, & GEORGE P. BURNETT, tenant in possession.

The said George P. Burnett, by Smith & Branham and Wm. Dougherty, his attorneys, comes and defends the force and injury, when, &c., and says that he is not guilty of the said supposed trespass and ejectment above laid to his charge, or of any part thereof in
46 manner and form as the said John Doe hath above thereof complained against him; and of this, he, the said George P. Burnett, puts himself upon the country, &c.

SMITH & BRANHAM.
WILLIAM DOUGHERTY.

And the said John Doe, as to the plea of the defendant by him above pleaded, and whereof he hath put himself upon the country, doth the like.

BROWN & POPE, *Pl'ff's Att'ys.*

We. the jury, find for the plaintiff the premises in dispute, April 1st, 1868.

M. R. BERRY, *Foreman.*

Whereupon it is considered and adjudged by the court here that the plaintiff do recover of the defendant city lots numbers seventy-eighty (78) and seventy-nine, (79,) in the Costanaula division of the city of Rome, in the county of Floyd, in the State of Georgia, property," and that a writ of habere possessionem do issue in favor of said lots comprising what is known as the "Rome Female College said plaintiff for said property. It is further adjudged that plaintiff

do recover of defendant the sum of dollars and cents for his costs of suit.

Judgment signed in open court, April 3rd, 1868.

BROWN & POPE,
Plaintiff's Attorneys.

47 UNITED STATES OF AMERICA, *Northern District of Georgia*:

I hereby certify that the foregoing is a full and complete transcript of the records and proceedings in [in] the District Court of the United States for the northern district of Georgia in an action of ejectment, in which John Doe, ex-dem. John M. M. Caldwell, is plaintiff, and Richard Roe, casual ejector, and George P. Burnett, tenant in possession, defendant, as the same remains of file in my office.

Given under my hand and seal of office, at office in Altanta, in said northern district of Georgia, this 4th day of April, A. D. 1868.

[SEAL.] W. B. SMITH, *Clerk*.

REC. 345—3

Supreme Court of the United States.

No. 346—186.

RICHARD ROE, Casual Ejector, and GEORGE P. BURNETT, Tenant in Possession,
Plaintiffs in Error,

vs.

JOHN DOE, Ex Dem. JOHN M. M. CALDWELL.

In Error to the District Court of the United States for the Northern District of Georgia.

APPELLANT'S BRIEF.

M. THOMPSON,
Attorney for Geo. P. Burnett.

H. Polkinhorn & Co., printers, 7 st., bet. 6th and 7th sts., Washington.

Supreme Court of the United States.

No. 346—136.

RICHARD ROE, Casual Ejector, and GEORGE P. BURNETT, Tenant in Possession,
Plaintiffs in Error,

vs.

JOHN DOE, Ex Dem. JOHN M. M. CALDWELL.

In Error to the District Court of the United States for the Northern District of Georgia.

APPELLANT'S BRIEF.

The appellee brought ejectment for the ground described in his petition on page 18 of Record.

Upon the trial, the plaintiff read, without objection, the deeds mentioned on page 1, and copied on pages 1, 2, 3, 4, 5.

The plaintiff then offered in evidence the deed mentioned on page 5, and copied on pages 5, 6, 7, to which the defendant objected, but the deed was read, and this was assigned as error.

This was error, for the following reasons:

First. This deed does not contain a description of any land conveyed or intended to be conveyed by it. It only

undertakes to convey the "real estate," &c., "described and bounded as mentioned in a deed from A. M. Sloan to the Trustees of Rome Female College." (See page 6.)

Second. The land described in the petition does not appear to be the identical land described in Sloan's deed to the trustees. (See pp 18 and 4.)

Third. In the petition the land is made to commence at a store "on Lumpkin street," and in the deed from Sloan it is made to commence at a store "on Lincoln street."

Fourth. There is nothing whatever to show that this deed from Sloan to the trustees is the identical deed referred to by the trustees in their said deed to Caldwell, and consequently nothing to show paper title in Caldwell to the land described in his petition. *Non constat*, that Sloan did not give "the trustees of Rome Female College" another or other deed or deeds of other lands.

The trustees had no power or authority to make that or any deed of conveyance of real property; no such power having been conferred by their charter.

Acts of Ga., 1857, p. 145.

Code of Ga., (before revision,) 1678. This act confers upon the Rome Female College the power to purchase real property, and is silent as to the sale of real property.

The well known maxim of construction, and a very sound one, is, *expressio unius est exclusio alterius.*

If it was intended by the legislature to confer upon the corporation the right to sell, it seems reasonable to suppose that it would have been expressed.

Shaw, C. J., 2 Metcf., 234, 241.
1 Story's Eq. Jur., sec. 102.
Story, J., 3 Story's R., 87–89.

It is also reasonable to suppose that the legislature, by its reticence in regard to the sale of property, intended that this corporation should not have the power to traffic or speculate by buying and selling real estate.

"It is the well settled doctrine of this Court that a corporation created by statute is a mere creature of the law, and can exercise no powers except those which the law confers upon it, or which are incident to its existence."

Perrine vs. Chesapeake and Del. Canal Co., 9 How., 172 and 184, and authorities.

"A corporation possesses only those properties which the charter of its creation confers upon it, either expressly or as incidental to its very existence."

Frederick vs. City Council of Augusta, 5 Geo., 561.

Grants by the public are to be strictly construed, and nothing passes by implication. The whole legislative history of this State shows, the understanding of our people has been, that exclusive privileges are never conferred where none such are expressly given by the charter.

Shorter vs. Smith, 9 Geo., 517.
See People vs. Utica Ins. Co., 15 Johns. R., 383.
The People vs. Geneva College, 5 Wend., 211, 219.
2 Cowen, 678.
In the matter of Howe, 1 Paige Ch., 214, 215.
Angell & Ames on Corp's, secs. 11, 256.

There can be no difficulty in the application of these principles to this case. It certainly is not necessary, to enable this corporation to fulfill the purposes of its existence, that it should have the power to sell this tract of land. If the corporation could make a valid sale of this tract of land, it

would have equal power to buy and sell any other lands and to become a mere trading corporation and speculator in real estate, and in that way absorb the entire means, resources, time, and energies of the corporation, and thereby subvert the very objects and purposes of its creation.

The deed from the trustees to Caldwell is not in the corporate name, and was therefore inadmissible.

Cleveland vs. Stewart et al., 3 Kelly (Ga,) R. 283, 293–4.
Angell & Ames on Corporations, sec. 99.
Smith Mer. Law, 133.

It should also be observed that, to bind a corporation by deed, the instrument must be sealed with a seal which is theirs; and there being no corporate seal to the deed from the trustees to Caldwell, it does not bind the corporation, and did not pass any right or title to Caldwell, and ought not to have been read in evidence.

Angell & Ames on Corporations, sec. 217, and numerous authorities there cited.

This deed to Caldwell should not have been admitted without proof that the persons whose names are thereunto subscribed were, at the time said deed was made, the trustees of the corporation by regular appointment, &c., and that they were duly authorized by the corporation to make the deed; and these facts should have been proved by the production of the books of the corporation and by the secretary; and no such proof was offered.

Angell & Ames on Corporations, sec. 283, and authorities there cited.

On page 10, sec. 23, Caldwell says, there were eighteen trustees, and Miller (p. 8, sec. 17) says there were twenty

trustees, and only eight names, as trustees, are signed to the deed, (see p. 7,) and there is no legal evidence that the corporation, by any by-laws, rules, or regulations, ever authort ized any number of trustees, less than the whole number of trustees, to execute any deed of real property, and no such power could be validly exercised by a minority under the charter *per se*.

It is important to observe, that Sloan (see p. 4, sec. 7) conveyed the land to W. S. Cothran, Alfred Shorter, N. J. Omberg, R. J. Johnson, H. V. M. Miller, *John Jones*, and "A. G. Pitner," as trustees, &c., on the 18th September, 1860, and that on the same day (see p. 5) W. S. Cothran, Alfred Shorter, N. J. Omberg, R. J. Johnson, H. V. M. Miller, "A. T. Pitner," and certain other so-called trustees, executed the said deed to Caldwell, and that *John Jones*, one of the co trustees in said deed from Sloan, did not concur in the said conveyance to Caldwell, and this is a fatal objection to that deed, and to all claim or pretence of title under it, as where there are co-trustees of lands, all must concur in a conveyance

Lewin on Trusts, 2d Am. Ed., 283, 284.

Ex parte Griffin, 2 Gil. & J., 116.

Doyley *vs.* Sherratt, 2 Eq. case, Ab., 742, and marginal note (D.)

Towley *vs.* Sherborne, Bridg., 35.

Williams *vs.* Nixon, 2 Beav., 472.

Gouldworth *vs.* Knight, 11 M. & W., 337.

The act of incorporation places this corporation "under the direction and control of the Synod of the Presbyterian Church of Georgia," and such important act as the sale of the real property of the corporation is *ultra vires* without the authority or direction of the Synod, and no such authority or direction is shown, and it cannot be presumed.

The next error assigned appears on page 9, sec. 19.

It was not admissible for the plaintiff to undertake to show by oral evidence the identity of the land referred to in the several deeds; that, if material to his case, could only properly be done by proper surveys, plats, maps, &c.

Nor did Caldwell, by his or any other evidence, show that the land for which he sued was the identical land mentioned in these deeds.

Some of the deeds described the land as bounded in part on Lincoln street, and the petition does not mention Lincoln street as forming any part of the boundary of the land sued for.

It is also to be observed (p. 20, sec. 46) that the jury found "*for the plaintiff for the premises in dispute,*" and the Court (same page) signed judgment for plaintiff, for "*city lots numbers* 78 *and* 79, *in the Costanaula division in the city of Rome;*" and Caldwell's petition (p. 18) does not mention "*lots numbers* 78 *or* 79," nor "Costanaula division," and this variance is fatal to Caldwell, in the absence of all legal evidence to show that the land mentioned in the judgment is the identical "*premises in dispute.*"

The next error assigned is on p. 11, secs. 24, 25.

This testimony was upon a material point in Caldwell's case, and was offered to show continuity of possession from Rogers to Caldwell. (See p. 10, sec. 22.) This is hearsay evidence, and was not brought within the rule of declarations against interest, in this:

First. That it was not shown that the higher degree of evidence, which Spullock himself might have given, was not attainable, in consequence of his death.

Second. It was not shown when, where, or under what circumstances the declarations were made.

Third. It was not shown that they were against his interest at the time when they were made.

Starkie on Ev., 8th Am. ed., pp. 64, 65, 66.
1 Green. on Ev., 12th ed., sec. 147.

The next error assigned is on p. 12, sec. 27.

It is submitted that it was error not to allow Burnett to prove that he paid a valuable consideration for the land, and all about it, and that he had, by such payment, &c., been subrogated to all the rights of Vliet.

The next error assigned is on p. 12 and 13, secs. 30, 31, and 32.

The first paragraph of this charge was error, because it literally instructs the jury that they may believe that Rogers was in continuous adverse possession for seven years, when Caldwell proved that Rogers was absent a part of the time, and was absent at one time as much as a year, and consequently could not possibly have been in continuous possession for seven years. (See the testimony of Miller, on p. 8, secs. 15 and 16.)

And there was no legal evidence that Spullock's possession was not adverse.

That part of the charge especially excepted to, on p. 13, secs. 31 and 32, is error, because it is the assertion of mere abstract propositions of law, and, whether true or not, is wholly immaterial, there being not a particle of evidence in the case to show that the purchaser had repudiated the contract under which Burnett obtained the possession, or that the purchaser had failed to comply with its terms.

The evident sense of that portion of the instructions especially excepted to, is, that as the plaintiff below had made no demand of the possession, he could not maintain his action, unless the purchaser (Vliet) had repudiated his contract

of purchase, or failed to comply with it, and as no testimony was offered upon either of these points, the instruction was purely hypothetical, and the action unmaintainable.

In ejectment, much is presumed in favor of the defendant, but nothing in favor of the plaintiff. The law holds him to proof of every thing necessary to enable him to maintain his action. Burnett entered into possession lawfully, and stands in the same relation to Caldwell as Vliet did, and ejectment could not be sustained against him without a notice to quit, or a notice that the contract was rescinded, or a demand of payment and notice of rescinding.

To show error in this instruction, and also in the refusal of the Court to grant the appellant's prayer, No. 4, (on p. 14, secs. 33 and 34,) the appellant relies upon the following authorities:

Livingston vs. Bryan, 1 Johns., 322.
4 Wend., 327.
Costigan vs. Wood, 5 Cr. C. C., 507.
Newby vs. Jackson, 1 Bar. & Cres., 448.

A person who enters and holds land, under a contract to buy it, is to be regarded as at least a tenant at will; and a tenant at will is not a wrong-doer, and ejectment will not lie against him, unless his tenancy be determined before the commencement of the suit.

2 Richardson, (S. C.,) 542.
4 T. R., 680.
1 B. & C., 126.
Lewis vs. Beard, 13 East., 210.
Brum vs. Rawlins, 10 East., 30.

These common law principles apply in this case.

3 Wheat., 212.

The statutes of Georgia require a demand in such a case as this.

Act 1827, 2 Cobb's Dig,, (Ga.,) pp. 901–2.
Irwin's Rev. Code, (Ga.,) sec. 2265.

Caldwell holds the money he received from Vliet for this land, and without producing the notes he also received, (see p. 11, sec. 24,) or proving non-payment or demand of payment, unconscionably sues to recover possession of the land as for a forfeiture, and the bond from Caldwell to Vliet contains no clause of forfeiture, and none is proved, and none appears in the case; and the law abhors forfeitures, and the courts are ever acute and astute to avoid their enforcement, and equity never enforces them.

Taylor's Landlord and Tenant, secs. 489, 493, 494, and authorities.
2 Green. on Ev., (10 ed.) secs. 326–7.
Duppa vs. Mayo, 1 Saunders' R., 287 and note.
1 Smith's Leading Cases, 77–8.
Cannon vs. Bradley, 1 How., 211, 217.
2 Story's Eq. Jur., secs. 13, 19, and authorities.

That the Court erred in refusing the appellant's prayer No. 1, at the bottom of p. 13, and Nos. 2 and 3, at the top of p. 14, and also his last prayer on same p., sec. 34.
See Ludlow vs. Myers, 3 Johns. R., 388, (Kent, Ch. J.,) Code of Georgia, 3290.

The possession was not continuous, and was irregular and interrupted.

See testimony on p. 8, secs. 15 and 16, and on p. 10, sec. 22.

The prior possession will not avail if it has been abandoned, without the *animus revertendi*.

Jackson vs. Dunn, 5 Cow., 200-1-2.
There is no evidence that Rogers left *animo revertendi*.
See p. 10, sec. 22.

Caldwell may have transferred Vleit's notes, and if so, this action cannot be maintained.

Tompkins vs. Williams, 19 Geo., 570.

Caldwell fails to show title in himself, and the legal title resides in the trustees of Rome Female College, and this is a good defence.

Jones vs. Scoggins, 11 Geo. R., 119.
29 Ga., 589.
Love vs. Sims, 9 Wheat., 524.
30 Ga., 355.
Adams on Eject., 32.

The plaintiff in ejectment must show the oldest legal title in himself.

Hard. (Ky.) R., 35.

He showed no valid paper title, and none by possession, for his possession and that of Vliet and Burnett combined did not amount to seven years before this suit. There was then no possessory title in Caldwell, within the Georgia statute of limitations to prevail over the prior legal title in the trustees The plaintiff in ejectment must have both the legal and equitable title.

Adams on Eject., 60.

Caldwell does not hold the equitable title; that is in the defendant, no default being shown in the payment of Vliet's notes, and there being no forfeiture of the defendant's equitable title. The defendant need only rebut the plaintiff's title.

Adams on Eject., 319.

When a contract is made for the sale of land in equity, the vendor is immediately deemed a trustee for the vendee of the estate; and the vendee, a trustee for the vendor, of the purchase money, and by this means there is an equitable conversion of the property.

2 Bouv. L. D., 607, sec. 8.
1 Foubl. on Eq., book 1, ch. 6, sec. 9, note *t.*
Story's Eq. Jur., secs. 789, 790, and 1212.

Land will be considered as converted into money and treated as such by a court of equity when the owner has contracted to sell his estate, in which case, if he die before the conveyance, his executors, and not his heirs, will be entitled to the money.

1 Bouv. Law Dict., 310, tit. "Conversion."
2 Vern., 52, (S. C.,) 3 Ch. R., 217.
34 Ga. 234.
1 Bl. R., 129.

Time is not of the essence of Caldwell's sale to Vliet, and Burnett has a perfect equity to compel Caldwell to execute a conveyance of this land to him, upon payment or tender of payment of Vliet's notes, if, in fact, they have not already been paid, and this is a sufficient answer to this action.

15 Ga. R., 527.
Pitts vs. Bullard, 3 Kelly's R., 5.
Crane vs. Beall, 20 Ga., 142.
30 Ga., 96–98.

M. THOMPSON,
Attorney for Geo. P. Burnett.

SUPREME COURT OF THE UNITED STATES.

No. ~~345.~~ 136

RICHARD ROE, Casual Ejector, and GEORGE P. BURNETT, Tenant in possession, Plaintiffs in Error, *vs.* JOHN DOE, *Ex. Dem.*, JOHN M. M. CALDWELL, Defendant in Error.	In Error to the District Court of the United States, for the Northern District of Georgia.

Argument of Joseph E. Brown, Attorney for Defendant in Error.

SUPREME COURT OF THE UNITED STATES.

No. 345.

RICHARD ROE, Casual Ejector, and GEORGE P. BURNETT, Tenant in possession, Plaintiffs in Error, *vs.* JOHN DOE, *Ex. Dem.*, JOHN M. M. CALDWELL, Defendant in Error.	In Error to the District Court of the United States, for the Northern District of Georgia.

Argument of Joseph E. Brown, Attorney for Defendant in Error.

This is an action of Ejectment for the recovery of a tract of land lying in the Northern District of Georgia; and it will be heard and determined in the courts of the United States in accordance with the laws of Georgia, which are the rules of decision by which the courts of the Union are bound in such cases. 6 *Peters Reps.* 291; 18 *Howard* 497; 24 *Howard* 427; 2 *Black* 419.

Under the laws of Georgia there can be no room for a reasonable doubt that the verdict and judgment of the District Court was right: 1. The plaintiff established a clear legal title by possession to the premises in dispute in Job Rodgers, under whom he held by a regular chain of paper title. 2. He established a legal title in himself, even if Job Rodgers had no title when he made the deed to Bass.

Under the statute of the State of force, prior to 1851-2, *adverse* possession for seven years, without color of paper title, created a good legal title to the premises. *Cobb's New Digest* 559, 561. A *void* grant from the State was sufficient color of title. 4 *Ga. Reps.* 116.

Every possession of the lands of another is *prima facie* adverse. 4 *Ga.* 313. *Paper title* was not necessary. 4 Ga. 314

In Fain *vs.* Garthright, 5 *Ga.*, on page 12, the Supreme Court, says:

In the numerous decisions which this Court has been called to make in cases growing out of our Statute of Limitations, we have assumed, as a basis of those decisions, that it is intended to be, and that we will make it in Georgia *a statute of*

repose. We look upon it as a highly beneficial statute, and in its effects calculated to quiet titles, suppress litigation, promote confidence in the tenure of property, and advance all the interests of commerce. Its policy is that of an *anti*-litigating jubilee (as to lands) once in seven years. There is no hardship in this policy. Let it be distinctly understood throughout the community that he who has a claim to land must assert it within seven years from its accrual or lose it, and it is not to be apprehended that many rights will be lost for want of diligence. On page 13 the learned Judge delivering the opinion admits that the weight of authority in other States is against the position taken by the court, but says the court has disregarded some of the subtle distinctions and unreasonable exceptions to the statute to be found profusely scattered through the English and American books. Again, on page 17 he says:

The language of our statute is broad enough to comprehend this and every other suit or action or writ. It seems to have no reference to the relations of the parties except in the exceptions named. It says not one word about adverse possession or *color of title.* It lays a plain burden upon the plaintiff, and prescribes to him a plain duty. It intends in *all cases* of right or claim of title, to require the claimant to assert his remedy within the time prescribed at the peril of having that remedy barred. Its language is to the effect that no suit or action of any kind shall be brought for land, no matter upon what right or claim originating after seven years from the accrual of such right or claim. It is particular in its specification of some remedies, and then in all comprehending terms excludes every possible remedy by suit unless brought within the limited term. And as if intensely anxious that there should be no misapprehension of its meaning, it designates the causes upon which suits or actions may arise, in such terms as must include all. For it bars all writs suits or actions whatsoever which may be sued or brought "by occasion or means of *any title or cause*" of action. It intends not only to bar suits for the quieting of *titles* to lands but suits brought upon *any cause* of action.

Again, on page 18, the learned Judge says: We have not adopted either the English or American construction of the statute of James.

In English *vs.* Register and others, 7 *Ga.*, on page 389, the Judge delivering the opinion says: The true doctrine with regard to the Statute of Limitations, when relied on to defeat a perfect paper title, I understand to be, both upon principle and authority, founded upon *adverse* possession, and that possession never will be considered as *adverse* to the title of the true owner, unless taken and held under *color of title* or *claim of right.* On page 390 he says: I do not hold that possession under color of *paper* title is indispensably necessary to protect a

party in possession of land under the Statute of Limitations. A party may acquire a *title* under the statute as against the true owner by *possession* accompanied by such *acts of ownership* and dominion over the premises as in law would amount to a *disseisin and ouster* of the true owner, to the extent of such possession. And on page 392 he says: The Statute of Limitations does not commence to run against the true owner of lands who is presumed in law to be in possession thereof until he is *disseised* and *ousted* of such possession by the *actual* possession of another, who enters upon the land under color of title, *hostile* in its inception to the title of the true owner; or when one enters upon the land and takes *actual* possession thereof, *without paper title, under a claim of right.*

In Pendergrast *vs.* Gullatt, 10 *Ga.*, page 222: This doctrine is affirmed. Judge Lumpkin, delivering the opinion, says: This court is not, therefore, only fully and *unanimously* committed to the doctrine that a *paper* title is not indispensably necessary to protect a party in this State in the possession of land under the plea of the Statute of Limitations, and that a *parol* contract of purchase may be set up by the defendant to defend his posession; but that even a *usurpation* of the possession, provided the occupancy be accompanied by visible and notorious acts of ownership, is sufficient for that purpose.

But I need not multiply quotations to show that the rule was firmly established in Georgia prior to the act of 1851-2, that *color of paper* title was not necessary to enable a defendant to set up the Statute of Limitations as a successful defence. Seven years possession under *claim* of right had in Georgia the same effect precisely, which possession for the statutory period in other States had under *color of title* and claim of right.

In a word such possession at the end of seven years, constituted title good against all the world, and a person having such *title* might have maintained ejectment upon it, as successfully in case of eviction, as he could have defended if sued in ejectment while in possession.

This doctrine is fully sustained by the Supreme Court in the case of Watkins *vs.* Woolfalk, 5 *Ga.* 268, where it was held that seven years' possession under color of title gave the occupant a right to maintain ejectment upon his title. In that case the possession was accompanied by color of title, but that made no difference as the court had established the rule that the statute run in favor of a person holding the land for seven years under color of title *or claim of right.* Either was a perfect defence. Either constituted a title, and either was sufficient to enable the occupant, if evicted, to maintain ejectment.

The effect of the decision is that a possessory title which will enable the defendant in ejectment to set up the Statute of Limitations successfully against a plaintiff who has a perfect paper title; will enable him to maintain ejectment after the

termination of the seven years' possession, if he should be evicted by the person having the paper title. This is a well established doctrine in Georgia.

How stands this case under this rule? The testimony of Hon. H. V. M. Miller, and of Rev. Mr. Caldwell, the plaintiff in the District Court, established the fact to the satisfaction of an intelligent court and jury, that Job Rodgers had held the property in dispute in possession till he had, under the law as it then stood, acquired a perfect legal title prior to his sale to Bass, 10th December, 1850. He was in possession of the premises in 1837, and remained there except an absence of part of 1838 and 1839, till December, 1850. His possession was open, notorious, adverse, and continuous for more than seven years, which made his title perfect. Then follows a complete chain of paper title from Job Rodgers to the plaintiff Caldwell with continuous possession.

Objection was made to the deed from the Trustees to Caldwell. But I do not think it calls for serious consideration, as it was in proof that seven trustees constituted a *quorum*, and the deed was signed by eight, and there were ten in attendance consenting to and ordering the sale. See page 11 printed record.

But admit for the sake of the argument that the law of Georgia always required seven years adverse possession of lands with *color of title* to make a perfect defence in ejectment, against the original owner who had a perfect paper title; which is the law since the statute of 1851-2, which changes the old law, and makes color of paper title necessary, and the case is still with Caldwell. The deed from Job Rodgers to Bass, and the chain of title from Bass to Caldwell was certainly good color of title. Under this color Caldwell and those under whom he held had been in peaceable, continuous, exclusive and uninterrupted possession of the premises for more than seven years, prior to the contract for sale between Caldwell and Vleit. And it is very clear under the ruling of the Supreme Court of Georgia in the case of Watkins *vs.* Woolfalk, already referred to, that Caldwell could maintain ejectment upon this title.

I trust I have shown to the satisfaction of the court that we make out a good title by possession into Job Rodgers, and a regular chain of paper title from him to Caldwell. And that we also show good title into Caldwell under the Statute of Limitations, if Rodgers had no title, starting with the deed from Rodgers to Bass as the foundation of our color of title. The possession under this color of title continued for nearly double the period required by the statute.

But if we were wrong in all this, the case is still with Caldwell. Vleit entered into possession under Caldwell and Burnett under Vleit. They are therefore estopped from denying

title in Caldwell. In 7 *Cowan*, 747, which was an action of ejectment, this very point is decided; also in Hightower *vs.* Williams, 38 *Ga.* 597.

There is nothing in the exception on page 9 of the printed record. As part of the deeds described the premises by metes and bounds and part of them by numbers, it was admissible to show by extrinsic evidence that the premises described in all the deeds were in fact the same—that the metes and bounds set forth in some of the deeds described the same lands which are embraced in numbers 78 and 79, and it was not error to permit the witness to look upon all the deeds, and then state whether the premises described in all were in fact the same. But if this were error, it is no sufficient ground for a new trial, as Caldwell in other parts of his testimony sufficiently identifies the premises in dispute.

The exception on page 11 of the printed record is disposed of by section 3721 of the Revised Code of Georgia, as well as by the general rules of evidence. That section of the Code enacts that: "Declarations of a person in possession of property in disparagement of his own title, are admissible in evidence in favor of *any one* and against privies. Declarations in favor of his own title are admissible to prove his adverse possession." The declaration of Spullock was in disparagement of his own title. He stated that he did not claim the property, but that it was Bass' property. If he had said he did claim it, this would have been admissible to show his adverse possession. In either view, it was properly admitted by the court according to the laws of evidence established in Georgia, which bind the United States courts sitting in this State. 5 *Peters' Reps.* 397; 12 *Pet.* 84.

The exception on pages 11–12 is equally unfounded. It was already in proof that Burnett purchased of Vleit, and it could in no possible way affect the rights of the parties litigant to prove how much he paid or promised to pay Vleit for the land. If Vleit had no title, it matters not what Burnett gave him for the property—it could in no way prejudice the rights of Caldwell. And the minds of the jury should not have been distracted by being led off into that investigation.

The only remaining question grows out of the charge of the court in reference to demand or notice to quit before action brought. The charge was strictly accurate. But I may remark here that it matters not whether the charge was technically correct or not, if it plainly submitted the question to the consideration of the jury. The substance of the charge was that Caldwell was not bound to make a demand before bringing this action; and that Burnett was not entitled to notice to quit before action brought. This was correct according to the laws of Georgia. It is the well established rule of law and the constant practice in this State, in cases between vendor and

vendee, where bond for titles is given, and the purchase money is not paid when due according to contract, to bring ejectment for the premises without demand or notice.

The general rule is that a tenant from year to year, or at will, is entitled to notice to quit before the commencement of the action. But the case of a contract to sell does not fall within the rule.

Whether notice shall be given or not is mere matter of practice. In Jackson *ex dem.* Church *vs.* Miller, 7 *Cowan*, 747, to which the attention of the court is respectfully invited, all the previous cases in New York are ably reviewed by Chief Justice Savage, and it is held to be the established practice in that State that notice to quit is not necessary in the case of a contract for sale. This rule has been adopted and is the established practice in Georgia.

In the late case of McHan vs. Stansell, decided at June Term, 1869, 39 *Ga.*, not yet published, but a certified copy of which is sent up with this argument, the very point was made, and the Supreme Court of Georgia unanimously held that no demand or notice to quit is necessary in such case. That was a summary proceeding to try the right of possession under the Code. Stansell had purchased the premises in dispute from Sasseen, and paid part of the purchase money. Afterwards, Martin became the owner of the premises, and the trade was changed over to Martin, who gave Stansell a bond for titles, on his paying, when due, two promissory notes for the balance of the purchase money. Stansell failed to pay when the notes were due; and as the Federal army advanced, Stansell left the premises vacant, with the intention of returning so soon as the movements of the armies would permit. When he returned, he found McHan in possession, as tenant of the administratrix of Martin, who died in the mean time. Stansell commenced this summary proceeding by affidavit, under the Code, to eject McHan, claiming that he (Stansell) was entitled to the possession. No notice to quit was given by either party. McHan filed his counter affidavit, setting up his claim to the possession, and denying Stansell's right. The issue thus made up was returned to the Superior Court for trial; and, on the hearing, the court ruled that Stansell was entitled to the possession upon this state of facts, and the jury found in his favor.

This decision was brought by writ of error to the Supreme court, and the judgment was reversed. The following was unanimously agreed upon by all the Judges as the decision of the Court upon the above state of facts.

1. In an issue under an act for the expulsion of intruders, if the defendant, in good faith, claims a legal right to the possession, he is not an intruder.

2. If the obligee in a bond for titles to land fail to pay the purchase money according to the agreement, no demand or

notice to quit is necessary to give the obligor a right of entry or action, and if he find the premises vacant and peacably enter, he is not an intruder.

Upon the point in question, McCay, Justice, who delivered the opinion, says:

"Under the facts of this case, however, we are of opinion that Mrs. Martin had a right to the possession. She had the legal title, and by the well-settled rules of the common law, the legal title must prevail.

"Atl aw, the right of Stansell would not be noticed. It is true, so long as the purchase money was not yet due, equity would enjoin the vendor from enforcing his legal right against the vendee, and, under our law, he might set up this equitable right by way of defence at law.

"But if the vendee failed to pay the purchase money, equity would refuse to interfere with the assertion of his legal right by the vendor. The vendee, if he seeks equity, must do equity. He could not ask the intervention of that Court so long as he was himself at fault. So soon as the purchase money is due and remains unpaid, the vendee is at fault, and equity would only interfere on his offer then to pay. The vendee had no better right under our law than he had in equity, and as equity would not interfere with the vendor's assertion of his legal rights, so long as the vendee was in fault, neither can he, under our law, set it up as a defense to the vendor's action to recover the premises.

"In truth, this right to recover the premises, is just what the parties contend for. The vendor retains the title. Why? Simply as a security for the purchase money. What is a security worth that the owner can not use?

"It is argued, however that the vendee has a right to notice to quit. In this case there was nobody in possession and therefore nobody to give notice to."

"The vendor found the premises vacant, and having the *right to the possession* he did, without resort to any legal proceeding, what the law would have done for him, had there been any body in possession to hinder him in the enjoyment of his own."

"But notice to quit would not have been required even to sustain a suit in ejectment. Notice to quit only is necessary in such cases, as by implication of law there is a contract, that the tenant may remain until notified to quit. A tenant for a fixed period—say for a year—if he holds over without any dissent by his landlord so long as fairly to raise an implied contract, that it is a mutual understanding that the tenancy is to continue, becomes a tenant from year to year, and is entitled to a notice to quit. And so too is a tenant at will."

"It will be found, I think, in all the cases requiring a notice to quit, that there is an implied contract growing out of the

circumstances of the case that the person in possession is to remain until the landlord notifies him to the contrary. The tenant is not in fault. He is in possession by the consent of the landlord, with an understanding that he is to remain until the landlord notifies him.

"Is this such a case? The vendor sells, or agrees to sell, to the vendee. He takes his notes for the purchase money and gives a bond that he will make titles on the performance by the vendee of his contract. On the faith of the vendee's promise he puts him in possession, to hold till the maturity of the notes, which is a fixed time. The day comes—the notes are dishonored. Can it with any sort of fairness be presumed that there is an understanding that the vendee should still keep the land until the vendor notifies him to leave? His right to sue, in our judgment, attaches immediately on the default of the vendee. He knows that he has broken his promise—that he has violated the bargain under which he went into possession, and notice to him that this is so is wholly useless. He did not go in to stay during the will of the landlord, but for a fixed period, to wit, till the notes matured.

"At that period it was understood the character of his holding was to cease. He was to become the legal owner.

"He fails to perform the condition agreed upon, and we see no ground for any presumption that he was to hold longer or until the vendor notified him to quit.

"This question is very fully discussed in 7 *Cowan*, 747, in the case of Jackson *vs.* Miller, and the authorities cited, and though it is there admitted that there is some conflict of the authorities yet it is clearly shown that the current of decisions and the reason of the thing is that no notice is necessary. The notice can only be for the purpose of notifying the vendee that the vendor is not willing for him to keep his land and not pay the money. The vendee knows this already. He has broken his contract, and has no right to a notice that the vendor intends to insist on his rights.

On the whole, therefore, we think the instruction of the court wrong, and we reverse the judgment."

This decision, in strict compliance with the well established practice in the State, settles the question as to the law of Georgia on this point. That law is the law of this case, and controls the rights of these parties as well in this court as in the courts of Georgia.

JOSEPH E. BROWN,
Attorney for Defendant in Error.